No. 85-610

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT R. PIAROWSKI,

Petitioner,

v.

ILLINOIS COMMUNITY COLLEGE DISTRICT 515, PRAIRIE STATE COLLEGE; RICHARD CREAL, President of Prairie State College; H. ROBERT ANDREWS, Vice-President for Instructional Services, Prairie State College; DR. JAMES H. GRIFFITH, MRS. LILLIAN J. BLECHSCHMIDT, MRS. ALMA L. MARTIN, MR. PAUL C. FRAKES, MR. JOSEPH HAWKINS, MR. CHARLES R. MASON, and MR. MICHAEL F. SHANLEY, members of the Board of Trustees of Prairie State College; all individually and in their official capacity, THOMAS G. GARDINER, MICHAEL R. MONTELEONE, DAVID M. AMADIO, JAMES S. TEYKL, and CARL TRIEBOLD, all in their official capacity as Members of the Board of Trustees of Prairie State College.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether speech by a faculty member in his official capacity, which damages the reputation of a community college, may be removed from a community college gallery and exhibition dedicated exclusively to speech which promotes the image of the community college, to another exhibition space in the same building.

2. Whether all of the exhibition space in the main building of a community college constitutes one forum, or whether each area of exhibition space in the building constitutes a separate forum for First Amendment purposes.

3. Whether the guard at the gate of the gallery, petitioner, is immune under the First Amendment from supervision by his superior, the respondent community college, with respect to works which the guard allows to be exhibited in the gallery.

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STATEMENT OF THE CASE

The trial court made the following findings of fact, either affirmed or not challenged in the Court of Appeals. See Appendix to Petition, pp. 2a-30a.

Respondents are a two-year community college ("Prairie State") in the suburban Chicago area, the members of its board of trustees, and several of its administrators. Respondents prepare students for transfer as upperclassmen to four-year colleges or give them career vocational training, and furnish general community educational programs. The community college district is racially diverse. Prairie State depends upon financial support through taxes extended upon real property within its district.

Petitioner is the chairman of the art department of Prairie State.

The first floor of the main building of Prairie State features a mall or multi-purpose area which is taken up with administrative offices, two cafeterias, a library, lounge areas, and rooms devoted to student activities and student government. Also on the first floor, alcoved off the mall and next to the main entrance of the building, is a gallery.

Prairie State created the gallery to hold exhibits by its various departments. It was designed to publicize the skill and ideas fostered at Prairie State. It was to be a showcase for a growing school within a proud community.

The gallery was not intended as a forum for use by the general public. Far from actively participating in displays to be held in the gallery, the public was the intended audience. Nor did Prairie State create the gallery for the unrestricted use of a "public" consisting of the art department and other faculty groups.

The community college administration retained authority to oversee the operation of the area, which was to be used by only a small, select number of its own people. Petitioner was delegated by the administration to select works to be displayed in the gallery.

An exhibit of the four full-time art department faculty members began in the gallery on March 3, 1980, and was scheduled to continue for three weeks. Prairie State intended the faculty exhibit to play an important role in its public

relations directed at the surrounding community. It intended to put itself in a favorable light through the art faculty exhibit.

Notices of the exhibition were placed by Prairie State's public relations specialist in the local press. Posters advertising it were placed throughout the community college. Flyers were distributed seeking to attract people from nearby schools and colleges and representatives of the community at large. The advertisements announced that photography, painting, drawing and stained glass by the art faculty would be on display.

The subjects of this lawsuit are three stained glass windows displayed by petitioner in the gallery as part of the art faculty exhibit. One window depicted from the rear what would easily be presumed to be a nude Negro woman engaged in sexual self-stimulation. Another depicted from the rear what would easily be presumed to be a nude Negro woman kneeling and embracing a symbolically massive phallus of a white man. The woman had her face buried against the scrotum and between the testes of the exaggerated phallus, with her arms and hands fully stretched worshipfully upward against the sides of its shaft. The third window depicted a woman in an excretory position. The windows were each twenty inches wide and twenty-eight inches in length. They were displayed at eye level a foot apart.

The exhibit had been open one week when the respondent administrators and several other community college officers met to consider their response to complaints they had received about the windows. Cleaning ladies complained to them. Students and others from the area joined in a public outcry against the works. Most complaints came from Negro women. Another segment of the community, not limited to Negroes and women, found the works of art deeply insulting. This group included taxpayers, students, teachers and other members of the community whom Prairie State drew upon for support. The exhibit generated considerable negative publicity for Prairie

State. The windows had created an ugly atmosphere which reflected unfavorably upon the community college.

The windows, placed in the art faculty exhibit held at the community college to enhance the image of Prairie State in the community, merged into the expression of the community college. Petitioner's display, in the setting in which it was used, was not private to him. Petitioner was contributing to an expression by Prairie State to its community. It was part of Prairie State saying to the community: "Like our college. Support it. Encourage members of your family to attend it. See, here is an example of our faculty."

Respondents decided to try to persuade petitioner to display the three windows elsewhere in the same building. They offered to rehang the windows in a gallery on the fourth floor. As the Court of Appeals noted, the fourth floor was served by an elevator from the first floor. The fourth floor gallery was a less obvious viewing area. Petitioner rejected this request, and the windows were taken down from the first floor gallery.

Respondents dealt with their perception of feelings created among the community college's students and employees, and the members of its surrounding community. This is what caused them to act as they did. Respondents believed that Piarowski probably was naively on the way to needlessly damaging what had been excellent community-to-institution rapport. To the trier of fact Piarowski's appearance and demeanor on the witness stand spoke an unawareness of certain contemporary sociological facts.

The trial court ruled in favor of respondents on all issues. The Court of Appeals affirmed that judgment.

SUMMARY OF ARGUMENT

In the last three years the Court has twice identified and discussed the standards governing access to government fora. No further pronouncement on this issue is necessary.

Petitioner was offered alternative exhibition space in the same building. Only one forum is at issue here, namely, the exhibition space in the entire building. Regardless of whether this forum is characterized as public, limited public, or non-public, petitioner was granted access to it.

Neither the general public, nor a limited public consisting of the faculty of Prairie State, was granted unrestricted access to the forum. Respondents retained at all times control over the forum.

ARGUMENT

I. Two Decisions By The Court In The Last Three Years Have Settled The Issue Of Access To Government Fora.

The Court thoroughly discussed the issue of access to government fora in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983). Three categories of fora were established: a traditional public forum; a limited public forum; and a non-public forum. These categories were presented as a continuum. A government could engage in the least regulation in a traditional public forum, and the most regulation in a non-public forum. That *Perry* is still good law is illustrated by *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. ____, 105 S.C. 3439 (1985). *Cornelius* quotes extensively from and relies entirely upon *Perry* in its consideration of the public forum aspect of that case.

The Court has clearly established its position on the issue of access to government fora. Therefore, no further review of the issue is necessary.

The issue of academic freedom is a red herring. Academic freedom does not give petitioner more protection for his expression than does the First Amendment.

II. Petitioner's Speech Was Not Suppressed.

Respondents offered petitioner alternative exhibition space in the same building. The decision to move the windows from one display area to another in the same building does not, therefore, amount to suppression of speech.

The forum at issue is exhibition space, not merely on the first floor, but in the entire building. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court struck down a zoning ordinance banning live entertainment. Critical to the Court's holding was that fact that there was "no evidence in this

record to support the proposition that the kind of entertainment appellants wish to provide is available *in reasonably nearby areas." Id.* at 76 (emphasis supplied). In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court allowed a location restriction. The Court stressed, however, that "[t] he situation would be quite different if the ordinance had the effect of *suppressing, or greatly restricting access to,* lawful speech." *Id.* at 71, n. 35 (emphasis supplied). In *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), the plaintiff sought to place political ads on city buses. The Court defined the forum at issue to be *all* city buses. Alternate display areas in the main building were close to the first-floor gallery. Access to these alternate areas was not restricted.

Because all exhibition space in the main building is part of the same forum, a decision that this forum is public, limited public or non-public is superfluous. Regardless of which it was, petitioner was not denied access to it. He was offered regulated access to it. Even access to a public forum can be regulated if reasonable—e.g., police barriers to keep strikers in a picket line from spilling into the street.

III. The Lower Courts Properly Applied This Court's Analysis To The Issue Of Petitioner's Access To Respondents' Forum.

Under *Perry* and *Cornelius,* the appropriateness of government regulation can only be determined through analysis of both the expression and the forum in which it occurs. Petitioner's arguments emphasizing the importance of protected speech only beg the question of the appropriate level of protection to be accorded his speech. As the Court stated in *Cornelius:*

> The conclusion that the solicitation which occurs in the CFC is protected speech only begins our inquiry. Even protected speech is not equally permissible in all places and at all times. . . . Recognizing that the Government, "no

> less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock,* 424 U.S. 828, 836 96 S.Ct. 1211, 1217, 47 L.Ed. 2d 505 (1976), the Court has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.,* 473 U.S. at ____, 105 S.Ct. at 3448.

The trial court found that:

> It [the gallery] was *not* intended, however, as a forum for the use of the general public. (App. to Petition, p. 13a; emphasis in original.)

The Court of Appeals affirmed, holding that the public was not allowed to exhibit in the gallery and that Prairie State's practice of inviting occassional outside exhibitors was insufficient to amount to a *de facto* designation of the area as a public forum.

Although petitioner asserts that the lower courts analyzed only the rights of the general public, the trial court reached and resolved the issue of a more limited public, stating:

> Moreover, neither did Prairie State create the gallery for the unrestricted use of a "public" consisting of the art department and other faculty groups. . . . the college administration retained a residual authority to oversee the operation of an area that was to be used by only a small, select number of its own people. (App. to Petition, p. 13a.)

Even if control had been passed to the faculty, however, it would have no significance under the Court's public forum analysis. The faculty is a part of the governmental body which administered the forum.

Even if the faculty were autonomous, limited use of a forum by a group closely related to the operation of an

educational institution does not create a public forum. See *Perry.* Although at some point access by a series of autonomous groups constitutes relinquishment of control, *Widmar v. Vincent,* 454 U.S. 263 (1981) (general use by student groups), limited use by a specific group is compatible with preservation of a non-public area. See *Perry* (union use), and *Cornelius* (use by "appropriate" voluntary organizations).

Petitioner also argues that the gallery is an "ideal example of a limited public forum" because it is "designed and dedicated to expressive activities" (Petition, p. 22). The Court has never held, however, that because a forum accommodates some expressive activity it necessarily becomes a public forum. In *Widmar,* the student union was not held to be a public forum because it accommodated some expressive activities, but rather because it had been generally opened for student use. In *Perry,* the interschool mail system remained a non-public forum despite its communicative nature because it had not been generally opened. The test, therefore, is not the ability of the forum to accommodate First Amendment expression, but the extent of its opening to uncontrolled, general use. As the Court said in *Perry:*

> If by policy or by practice the Perry School District has opened its mail system for indiscriminate use by the general public, then PLEA [petitioners] could justifiably argue a public forum has been created. *Id,* 460 U.S. at 47.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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